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QUESTION PRESENTED

Whether the district court's race-conscious order enforcing two consent decrees against recalcitrant state agencies previously found to have blatantly violated the rights of blacks abridges the Equal Protection Guarantee.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the court of appeals were as follows: Phillip Paradise, Jr., and the class he represents; the United States of America; the Alabama Department of Public Safety and its director, Byron Prescott; and intervenors V.E. McClellan, William M. Bailey, D.B. Mansell, and Dan Davenport, white troopers, and the class they represent.*

*Although originally a plaintiff, the NAACP voluntarily withdrew as a party during the course of the litigation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-999

UNITED STATES OF AMERICA,
Petitioner,

v.

PHILLIP PARADISE, JR., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The 1985 opinion of the court of appeals (Pet. App. 1a-54a) is reported at 767 F.2d 1514. The 1983 order and memorandum opinion of the district court (Pet. App. 55a-64a; J.A. 128-137) are reported at 585 F. Supp. 72. Earlier decisions below, which bear directly upon the issue before this Court, are: *NAACP* v. *Allen*, 340 F. Supp. 703 (M.D. Ala. 1972) (J.A. 23-29), *supplemented sub. nom. United States* v. *Dothard*, 373 F. Supp. 504 (M.D. Ala. 1974), *aff'd sub nom. NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Paradise* v. *Dothard*, No. 3561-N (M.D. Ala. Aug. 5, 1975) (J.A. 30-36); *Paradise*

v. *Shoemaker*, 470 F. Supp. 439 (M.D. Ala. 1979); and *Paradise* v. *Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983).

STATEMENT

This case presents the narrow question whether the district court's order directing the Alabama Department of Public Safety (the "Department") and the Alabama Personnel Department to promote one qualified black trooper for each white trooper promoted until the Department adopts acceptable promotion procedures or until 25 percent of the officers at a given rank are blacks violates the Constitution's Equal Protection Guarantee. Adopted to remedy the continuing effects of notorious racial discrimination and to enforce two consent decrees designed to insure that blacks would attain supervisory positions within the Department, the district court order was a necessary remedy narrowly tailored to further these compelling purposes without unnecessarily infringing on the employment opportunities of white troopers.

The case now before this Court is but the latest chapter in continuing efforts to desegregate the Alabama state troopers. Proceedings were initiated in January 1972 when the NAACP brought this action against the Department and the Alabama Personnel Department alleging that the defendants systematically excluded blacks from employment in violation of the Fourteenth Amendment. J.A. 23-24. The United States was joined as a party plaintiff (and *amicus curiae*), and Phillip Paradise, Jr., was permitted to intervene on behalf of a class of black plaintiffs ("Paradise"). Pet. App. 3a.

After a hearing, Judge Frank Johnson found:

> Plaintiffs have shown without contradiction that the *defendants have engaged in a blatant and continuous pattern and practice of discrimination in hiring* in the Alabama Department of Public Safety, both as to troopers and supporting personnel. *In the thirty-seven-year history*

> *of the patrol there has never been a black trooper* and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained and unexplainable discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment.

NAACP v. *Allen*, 340 F. Supp. at 705; J.A. 25 (emphasis added).

NAACP v. *Allen* was not the first time that the employment practices of Alabama state agencies had been condemned by the federal court. In *United States* v. *Frazer*, 317 F. Supp. 1079 (M.D. Ala. 1970), Judge Johnson had found that various state agencies, including the Alabama Personnel Department,[1] were systematically violating the constitutional rights of black applicants and employees. *Id.* at 1089-90.[2] In his decision, Judge Johnson noted that extended and repeated efforts to persuade Alabama even to acknowledge constitutional guarantees had failed:

> From 1963 until the commencement of this lawsuit in June, 1968, federal officials made repeated but unsuccessful efforts to persuade defendant officials and their predecessors to adopt a regulation expressly prohibiting discrimination on the ground of race or color . . . . Defendants have repeatedly refused to adopt such a regulation. *Alabama is the only state among the fifty*

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[1] "Since the Department of Personnel was one of the defendants in *Frazer* and Personnel supplies employees to all state agencies, the provisions of the *Frazer* order were applied across the board to all Alabama agencies." *United States* v. *Dothard*, 373 F. Supp. at 506.

[2] The discrimination was not subtle. It included the "practice of segregating employees by race in the use of facilities such as rest rooms, snack bars, and cafeterias." 317 F. Supp. at 1090.

states which has refused to adopt such a regulation.

Id. at 1084-85 (footnote omitted) (emphasis in original).

In light of *Frazer*, Judge Johnson found that the defendants in *NAACP* v. *Allen* "unquestionably knew and understood that their discriminatory practices violated the Fourteenth Amendment to the United States Constitution." 340 F. Supp. at 708.[3] Accordingly, he enjoined them from engaging in discriminatory "employment practices, including . . . promotion," and ordered them to "hire and permanently employ . . . one Negro trooper for each white trooper hired until approximately twenty-five (25) percent of the Alabama state trooper force is comprised of Negroes." J.A. 27.

Defendants appealed. While that appeal was pending, the court of appeals ordered the district court to supplement the record and to reconsider its decree in the light of current information. *See United States* v. *Dothard*, 373 F. Supp. at 505. Following discovery and the submission of additional data,[4] Judge Johnson decided to leave his original decree unaltered. *Id.* at 508. Comparing the relative efficacy of the injunction prohibiting discrimination in *Frazer* and the numerical relief ordered in *Allen*, Judge Johnson concluded:

> The contrast in results achieved to this point in the *Allen* case and the *Frazer* case under the two orders entered in those cases is striking indeed. Even though the agencies affected by the *Frazer* order and the Department of Public Safety draw upon the same pool of black applicants — that is, those who have been processed through the

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[3] Because the defendants' actions were so defiant, Judge Johnson found that their defense in *NAACP* v. *Allen* amounted to "unreasonable and obdurate conduct" meriting an award of attorneys' fees against them. 340 F. Supp. at 708.

[4] The district court specifically added to the record in this case the evidence that had been received in *Frazer*. 373 F. Supp. at 508.

> Department of Personnel — *Allen* has seen substantial black hiring, while the progress under *Frazer* has been slow and, in many instances, nonexistent . . . .
>
> [T]his Court's experience reflects that the decrees that are entered must contain hiring goals; otherwise effective relief will not be achieved.

Id. at 506-507 (footnotes omitted).

On appeal, defendants did not challenge the district court's finding of blatant discrimination. *NAACP* v. *Allen*, 493 F.2d at 617. Instead, they attacked only the affirmative relief granted, contending that the one-for-one hiring order unconstitutionally discriminated against white applicants. *Id.* at 617-618.[5] Observing that the "supplemental record here" comparing the progress under *Allen* with that under *Frazer* "provides an unusual confirmation of the feasibility, wisdom and efficacy of the [*Allen*] decree," *Id.* at 621, the court of appeals rejected defendants' contention and affirmed the judgment below. *Id.* at 622. The court noted that the remedial hiring order:

> is not without its limitations. The use of quota relief in employment discrimination cases is bottomed on the chancellor's duty to eradicate the continuing effects of past unlawful practices. By mandating the hiring of those who have been the object of discrimination, quota relief promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise, erected by past

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[5] In substance, defendants raised in *Allen* the same constitutional argument with respect to hiring that Petitioner here raises with respect to promotion. In *Allen*, the United States supported the one-for-one hiring order.

> practices. It is a temporary remedy that seeks to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit.

Id.

Shortly after the court of appeals' 1974 decision, the plaintiffs were forced to seek supplemental relief. Following a hearing, the district court found in 1975 that "defendants have, for the purpose of frustrating or delaying full relief to the plaintiff class, artificially restricted the size of the trooper force and the number of new troopers hired." J.A. 34. Even the few blacks hired under the court's 1972 order had faced discriminatory conditions.

> [T]he high attrition rate among blacks resulted from the selection of other than the best qualified blacks from the eligibility rosters, some social and official discrimination against blacks at the trooper training academy, preferential treatment of whites in some aspects of training and testing, and discipline of blacks harsher than that given whites for similar misconduct while on the force.

Id.

In September 1977, plaintiffs were required once again to move the district court for supplemental relief. J.A. 5. "Faced with [a] poor track record, as well as additional allegations of discrimination"[6] — including discrimination in making promotions to the position of corporal[7] — the defendants,

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[6] Pet. App. 40a.

[7] *See* Plaintiffs' Motion for a Preliminary Injunction ¶ 7(e), *Paradise* v. *Hilyer*, No. 3561-N (M.D. Ala. June 15, 1978) ("Not one black trooper has been promoted past the trooper rank, whereas six of the white

after extensive discovery, entered into a Partial Consent Decree ("1979 Decree") with plaintiffs and the United States. *See* J.A. 37. At the time, the Department had not promoted a single black trooper above the entry-level. *Paradise* v. *Shoemaker*, 470 F. Supp. at 442.

Under the 1979 Decree, the parties recognized the continuing force of the district court's 1972 and 1975 orders. J.A. 37. To help create a "racially neutral" employment and promotion system, J.A. 37, defendants agreed to implement a new disciplinary review procedure, J.A. 38-39, a race relations program, J.A. 39-40, and a promotion procedure that would have "little or no adverse impact upon blacks seeking promotion to corporal." J.A. 40.[8] The Department promised to develop such a promotion procedure and submit it for the plaintiffs' review and the court's approval "no later than one year from the signing of th[e] Consent Decree," i.e., by February 16, 1980. J.A. 40, 45.[9] Once a new procedure for promotion to corporal was in place, the Department agreed that it would develop promotion procedures having little or no adverse impact upon blacks for "the position of sergeant, and, in turn, for the positions of lieutenant, captain, and major." J.A. 41.

Five days after the district court approved the 1979 Decree, defendants sought "clarification" of the 1972 order, asking "whether the twenty-five percent hiring quota applies to the entire state trooper force or just to entry-level troopers."

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troopers who were hired since 1972 have been promoted to the rank of corporal.").

[8] The Department also agreed that the promotion procedures would conform to the Uniform Guidelines on Employee Selection Procedures. J.A. 40; *see* 29 C.F.R. § 1607 (1985).

[9] In the interim, the Department agreed to use a promotion procedure pursuant to which four black troopers were promoted to corporal. J.A. 41, 46-48; Pet. App. 42a n.16.

Paradise v. *Shoemaker*, 470 F. Supp. at 440. "On this point," the court responded, "there is no ambiguity. The Court's order required that one-for-one hiring be carried out until approximately twenty-five percent of the *state trooper force* is black. It is perfectly clear that the order did not distinguish among troopers by rank." *Id.* (emphasis in original).

In rejecting defendants' argument that the hiring order went further than necessary to eradicate the effects of past discrimination, the court declared:

> To modify this order would be to do less than the law requires, which is to eradicate the continuing effects of past unlawful practices. In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions. The Court found that in thirty-seven years there had never been a black trooper at any rank. One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*. The quota fashioned by the Court provides an impetus to promote blacks into those positions. To focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest. . . . The order in this case is but the necessary remedy for an intolerable wrong.

Id. at 442 (emphasis in original).

In April 1981, more than a year after the deadline to which it had agreed in the 1979 Decree, the Department proposed a selection procedure for promotion to corporal and requested its approval by the district court. Both the United States and Paradise objected. In a joint response, they observed that the examination had not been validated and that its use would not be justified if the results had an "adverse impact" on black applicants. Pet. App. 12a; *see* J.A. 50. But, to put an

acceptable promotion procedure in place expeditiously, the parties entered into a second consent decree in August 1981 ("1981 Decree"). J.A. 49-54.

Under the 1981 Decree, defendants reaffirmed their obligation under the 1979 Decree "to utilize a selection procedure which has little or no adverse impact on blacks seeking promotion to corporal." J.A. 50. The parties agreed that the Department's proposed promotion procedure would be administered and the results "reviewed to determine whether the selection procedure has an adverse impact against black applicants." J.A. 51. Under the scoring system, four factors were weighted in the following manner: written test, 60 percent; length of service, 10 percent; supervisory evaluation, 20 percent; and service ratings, 10 percent. J.A. 56. Given the method of rating length of service, differences in seniority could account for no more than a three percent difference in the final scores of candidates for promotion.[10]

If the proposed promotion procedure had little or no adverse impact upon blacks, selections were to be made in rank order. If the parties agreed, or the court found, that the procedure had an adverse impact upon blacks, promotions were to be made "in a manner that does not result in adverse impact for the initial group of promotions or cumulatively." J.A. 52. To accomplish this goal, defendants were required to submit an alternative proposed promotion procedure and, if the parties failed to agree on the method for making promotions, the matter was to be "submitted to the Court for resolution." J.A. 52-53.

In October 1981, 262 applicants took the written corporal's examination. Pet. App. 14a; J.A. 119. Of the 60 blacks, only

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[10] The minimum length of service rating was 70 points; the maximum, 100 points. J.A. 51. Applying the 10 percent weight for length of service used in arriving at a candidate's final score, the minimum number of points for seniority in the final score was 7; the maximum, 10.

five were ranked among the top half of the applicants; the highest was ranked number 80. Pet. App. 14a; J.A. 119. In June 1982, in response to an inquiry from the United States, the Department stated that "there was an immediate need for 8-10 promotions to corporal, and that 16-20 promotions would ultimately be made from the promotion list before the construction of a new list." Pet. App. 14a. The United States "objected to rank-order use of the promotion procedure, contending that . . . such use would result in substantial adverse impact on black applicants for promotion to corporal," Pet. App. 14a-15a, and advised the Department to "abide by the terms of the 1981 Decree and formulate a 'proposal for making promotions in a manner that does not result in discriminatory impact on black troopers.'" Pet. App. 15a (citation omitted). The Department did not do so. Brief for the United States at 8.

In April 1983, Paradise moved the district court for an order enforcing the terms of the two consent decrees. Pet. App. 15a; J.A. 58. Paradise sought an order requiring the defendants to promote blacks to corporal "at the same rate at which they have been hired, 1 for 1, until such time as the defendants implement a valid promotion procedure." J.A. 62. According to Paradise, such an order was justified by the terms of the decrees, would "encourage defendants to develop a valid promotional procedure as soon as possible," and would "help alleviate the gross underrepresentation of blacks in the supervisory ranks of the Department." J.A. 62.

Although it opposed a one-for-one promotion requirement, the United States agreed that the consent decrees should be enforced. Pet. App. 15a-16a. Noting that "defendants [had] failed to offer any reasons why promotions should not be made, nor had they offered an explanation as to why they halted progress towards remedying the effects of past discrimination," Pet. App. 16a n.10, the United States contended that the Department's failure to come up with a promotion plan in conformity with the 1979 and 1981 Decrees

"'suggests that a pattern of discrimination against blacks in the Department . . . may be continuing.'" *Id.* (citation omitted).

Defendants opposed the motion to enforce. In addition, four white applicants for promotion to corporal "moved to intervene on behalf of a class composed of those white applicants who took the corporal's promotion examination and ranked #1 through #79." Pet App. 16a; *see* J.A. 81-87. Claiming that the 1981 promotion procedure had been administered "in a racially neutral and non-discriminatory manner", J.A. 107, intervenors maintained that the no adverse impact provisions of the 1979 and 1981 Decrees, as well as the relief sought by Paradise, were "unreasonable, illegal, unconstitutional or against public policy." J.A. 99.

On May 27, 1983, the district court held a hearing on the motion to enforce and the motion to intervene. Pet. App. 17a. In an order entered October 28, 1983, the district court determined that the defendants' selection procedure had an adverse impact on black applicants. *Paradise* v. *Prescott*, 580 F. Supp. 171 (M.D. Ala. 1983) (J.A. 117-124).[11] Noting that the Department "need[ed] additional corporals and . . . need[ed] at least 15 of them as soon as possible," J.A. 119, the court concluded:

> Applying the four-fifths rule [of the Uniform Guidelines] and assuming fifteen candidates are to be promoted in rank order based on the selection procedure results, the success rate for white persons would be 15/202 or 7.4%, and the success rate for black persons would be 0/60 or 0%. Zero is, of course, less than four-fifths of 7.4. Indeed, even if seventy-nine corporals were promoted in

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[11] In a separate order filed the same day, the district court allowed the intervenors to participate in the case on a prospective basis only; the court held that as to prior orders, judgments, and decrees, intervention was untimely. J.A. 116. The intervenors did not appeal the court's order limiting intervention. Pet. App. 49a.

> rank order, none would be black. *Short of outright exclusion based on race, it is hard to conceive of a selection procedure which would have a greater discriminatory impact.*

J.A. 120-121 (emphasis added).[12] In light of this conclusion, the court ordered the Department to submit, by November 10, 1983, "a plan to promote to corporal, from qualified candidates, at least 15 persons in a manner that will not have an adverse racial impact." J.A. 123.

On November 10, 1983, the Department submitted to the district court a proposal to promote 15 troopers to the rank of corporal, of whom four would be black, "utilizing the 'rule of three' as provided in the Alabama Merit System Law." J.A. 126.[13] In the Department's words, its plan would apply "on a one time basis only." J.A. 125. As in the past, the Department promised to produce a "nondiscriminatory" promotion procedure "as soon as possible." J.A. 126. The United States did not oppose the Department's proposal. Pet. App. 19a.

Paradise objected. Pointing out that the Department's proposal ignored the injury black troopers had suffered from the defendants' inexcusable delays and "'fail[ed] to provide

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[12] "Accepting the defendants' anticipated evidence as true," the district court also rejected the defendants' contention that the one-for-one hiring order was a special program within the meaning of section 4D of the Uniform Guidelines, 29 C.F.R. §1607.4.D, that would insulate the defendants from a finding of adverse impact. J.A. 121.

[13] Under the "rule of three", the Department was not required to select any particular individual for promotion. Instead, the Director of the Personnel Department certified for the Department's consideration "the name of the three ranking eligibles . . . and, if more than one vacancy is to be filled, the name of one additional eligible for each additional vacancy." Ala. Code § 36-26-17 (1975), *amended by* Ala. Code § 36-26-17 (1985). In 1985, the "rule of three" was replaced by the "rule of ten." Ala. Code § 36-26-17 (1985).

any mechanism that will insure the present scenario will not reoccur,'" Pet. App. 18a (citation omitted), Paradise argued that approval of the Department's one-time plan would, in effect, sanction the defendants' recalcitrance. Pet. App. 19a.

On December 15, 1983, the district court granted Paradise's motion to enforce the 1979 and 1981 Decrees. *Paradise* v. *Prescott*, 585 F. Supp. 72 (M.D. Ala. 1983) (J.A. 128-137). In reaching its decision, the court reviewed not only the Department's 37-year, pre-1972 history of blatant discrimination against blacks, but also its post-1972 history of recalcitrance. J.A. 130-131. The court found:

> On February 10, 1984, less than two months from today, twelve years will have passed since this court condemned the racially discriminatory policies and practices of the Alabama Department of Public Safety. Nevertheless, the effects of these policies and practices remain pervasive and conspicuous at all ranks above the entry-level position. Of the 6 majors, *there is still not one black.* Of the 25 captains, *there is still not one black.* Of the 35 lieutenants, *there is still not one black.* Of the 65 sergeants, *there is still not one black.* And of the 66 corporals, *only four are black.* Thus, the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future. The preceding scenario is intolerable and must not continue.

J.A. 132-133 (emphasis in original).

To address this longstanding, intolerable condition and the "department's delay in developing acceptable promotion procedures for all ranks," the district court entered an order

"requiring that, for each white trooper promoted to a higher rank, the department shall promote one black trooper to the same rank, *if there is a black trooper objectively qualified for the promotion.*" J.A. 133 (emphasis added). The order remains "in effect as to each rank above entry level until either 25% of the rank is black or the department has developed and implemented for the rank a promotion procedure which meets the requirements of the prior orders and decrees of th[e] court and all other legal requirements." J.A. 133-134.

As experience in this case demonstrated, lesser measures would not suffice. According to the district court, "[t]he racial imbalances in the upper ranks of the Alabama Department of Public Safety remain egregious and are now of long duration, and, furthermore, it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action these intolerable disparities will not dissipate within the near future." J.A. 135. "This court has before it a record demonstrating that without promotional quotas the continuing effects of this discrimination cannot be eliminated." J.A. 136.

After determining that the one-for-one promotion requirement was necessary, the district court concluded that it was "specifically tailored to redress the continuing effects of past discrimination" and did "'not unnecessarily trammel the interest of white employees.'" J.A. 135 (footnote omitted), *quoting United Steelworkers* v. *Weber*, 443 U.S. 193, 208-09 (1979). According to the district court, the order does:

> not require the discharge or demotion of a white trooper or his replacement with a black trooper; nor [does it] create an absolute bar to the advancement of white troopers. Moreover, [it is] but a temporary measure, designed not to maintain a racial balance, but simply to eliminate a manifest and chronic racial imbalance. Finally,

> only qualified black troopers will be considered for promotion....

J.A. 135.[14]

In February 1984, the Department promoted eight blacks and eight whites to corporal pursuant to the district court's one-for-one requirement. Pet. App. 22a. On June 19, 1984, the Department submitted for the court's approval a proposed procedure for promotion to corporal, representing in an accompanying statement that the procedure "conforms with the applicable statutes and Orders entered in this case." J.A. 142; *see* Pet. App. 45a-48a, J.A. 144-145. The United States expressed the view that the proposed procedure did not appear to have "an unlawful adverse impact" upon black applicants and hence was acceptable under the consent decrees. J.A. 161. On July 27, 1984, the district court ruled that the Department could promote up to 13 troopers to corporal in accordance with its new procedure and temporarily suspended the one-for-one promotion mechanism for that purpose. J.A. 163-164. On October 25, 1984, the district court, following the defendants' submission of a new selection procedure for promotion to sergeant, similarly suspended the one-for-one requirement at the sergeant rank. J.A. 176-177. Since that time, "the defendants have been allowed to promote only white troopers to the lieutenant and captain ranks since there apparently are no black troopers qualified for promotion to those ranks." Pet. App. 54a.

The court of appeals consolidated the various appeals from

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[14] In its Statement, Petitioner asserts that the district court found the promotion order to be "reasonable" under *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979). Brief for the United States at 11. What Petitioner fails to say is that the court also found the promotion order to be "clearly necessary" and "sepcifically tailored to redress the continuing effects of past discrimination." J.A. 135.

the district court's December 15, 1983 order[15] and the intervenors' appeal from the July 27, 1984 order and, in a thorough opinion, affirmed the district court's decision. Pet. App. 1a-54a. First, it rejected the appellants' contention that the district court's order improperly modified, rather than simply enforced, the 1979 and 1981 Decrees. Pet. App. 23a. Construing the consent decrees to prohibit "adverse impact" against blacks, but not whites, Pet. App. 26a, the court held that the lower court "did not . . . exceed the relief authorized by those decrees when it granted plaintiffs' motion to enforce." Pet. App. 27a. This Court declined review of this ruling. 106 S.Ct. 3331 (1986).

Second, the court of appeals held that the order adopting the one-for-one promotion requirement did not violate Title VII. Pet. App. 28a-35a. In so ruling, the court distinguished *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561 (1984), and concluded that the district court's order "will not be reversed simply because black troopers promoted under it have not been identified as specific victims of unlawful discrimination." Pet. App. 34a-35a. This Court declined review of this ruling as well. 106 S.Ct. 3331.

Third, the court of appeals held that the district court's order did not deprive white troopers of their constitutional rights to equal protection. Pet. App. 35a-42a. After reviewing past precedent, the court expressed the view that "the differences between the various" equal protection tests "are more of phraseology than of substance". Pet. App. 39a. The court concluded that "the relief now at issue was designed to remedy the present effects of past discrimination," Pet. App. 40a — "effects which, as the history of this case amply demonstrates, 'will not wither away of their own accord,'" Pet. App. 41a (citation omitted) — and "extends no further

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[15] The United States, the Department, and the intervenors had appealed. Pet. App. 22a.

than necessary to accomplish the objective of remedying the 'egregious' and longstanding racial imbalances in the upper ranks of the Department." Pet. App. 41a (citation omitted). As a result, the court declared that it was not prepared "to upset the considered judgment of the district court that 'without promotional quotas the continuing effects of this [long-term, open and pervasive racial] discrimination cannot be eliminated.'" Pet. App. 42a (citation omitted) (bracketed material by the court).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the Court with a race-conscious remedial order designed to open the upper ranks of the Alabama state troopers to qualified blacks. Although the Government claims that Alabama's Department of Public Safety "had already made substantial progress" by the time the order was entered, Brief for the United States at 37, the reality is that this case demonstrates why the Court has "recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account." *Wygant* v. *Jackson Board of Education*, 106 S.Ct. 1842, 1850 (1986) (opinion of Powell, J.).

In deciding this case, the Court need not resolve questions concerning the proper formulation of the equal protection test.[16] Even assuming that "strict scrutiny" is applicable, the

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[16] Although the Government states that "[t]he proper standard by which to evaluate the constitutionality of race-conscious governmental action under the Equal Protection Clause is now clear," Brief for the United States at 17, this Court has expressed the opposite view. *See Local 28 of the Sheet Metal Workers' Int'l Ass'n* v. *EEOC*, 106 S.Ct. 3019, 3052 (1986) (opinion of Brennan, J.) ("[w]e have not agreed ... on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures"); *Wygant*, 106 S.Ct. at 1852 (O'Connor, J., concurring) ("standard applicable to racial classifications that work to the

district court's order easily withstands it. By enforcing the consent decrees, the order furthered a compelling governmental interest — eradicating the pervasive effects of the Department's egregious discrimination. Contrary to the suggestion of the other parties, the order was not entered merely because the Department failed to achieve "racial balance." Rather, it was entered as a result of the Department's refusal to abide by its judicially-entered consent decree commitments — commitments that required the Department to allow qualified black troopers to advance.

Like the one-for-one hiring requirement imposed in 1972, the conditional one-for-one promotion requirement at issue here was "but the necessary remedy for an intolerable wrong." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442. The "record here provides an unusual confirmation of the feasibility, wisdom and efficacy of the" promotion order. *NAACP* v. *Allen*, 493 F.2d at 621. After twelve years of tenaciously refusing to advance blacks past the entry-level, the Department finally has moved to adopt promotion procedures by which black troopers can progress as a result of the court's command.

The district court's order is carefully crafted. It accommodates legitimate reasons for the Department's failure to promote blacks because it requires neither unnecessary promotions nor the promotion of the unqualified. The applicability of the one-for-one promotion requirement is extremely limited. It operates only if the Department fails to fulfill its consent decree commitment to develop acceptable promotion procedures and, then, only if the Department has not achieved the goal of 25 percent black representation at a given rank — a goal clearly related to availability. Courts often

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disadvantage of 'nonminorities' has been articulated in various ways"); *Wygant*, 106 S.Ct. at 1867 n. 7 (Marshall, J., dissenting) ("I do not envy the District Court its task of sorting out what this Court has and has not held today.").

have imposed far more stringent race-conscious measures.

The district court's order has only a limited impact on white troopers. It does not require the demotion or discharge of any white troopers, does not bar white troopers from advancing, and does not disrupt any legitimate expectations for promotion white troopers may have on the basis of valid selection procedures. Like a hiring goal, the one-for-one promotion requirement here results in, at most, a "[d]enial of a future employment opportunity." *Wygant*, 106 S.Ct. at 1851 (opinion at Powell, J.). And unlike preferential layoff schemes, the one-for-one promotion requirement has literally no impact on any legitimate expectations based on seniority. In this case, failing to achieve a promotion is far more akin to not being hired than it is to losing an existing job.

ARGUMENT

THE DISTRICT COURT'S ENFORCEMENT ORDER DOES NOT VIOLATE THE CONSTITUTION'S EQUAL PROTECTION GUARANTEE BECAUSE IT IS NARROWLY TAILORED TO REMEDY THE PERVASIVE EFFECTS OF THE DEPARTMENT'S EGREGIOUS DISCRIMINATION

A. *Remedying the Pervasive Effects of the Department's Egregious Discrimination by Enforcing Its Consent Decree Commitments Is a Compelling Governmental Interest*

As the Government acknowledges, "[g]iven the pervasive past discrimination practiced by the Department, . . . the first prong of this Court's 'strict scrutiny' test [the compelling governmental interest requirement] is met here." Brief for the United States at 21-22; *see, e.g.*, *Wygant*, 106 S.Ct. at 1850-51 (opinion of Powell, J.); *id.* at 1853 (opinion of O'Connor, J.); *Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of

Brennan, J.). Indeed, the district court's "order is supported not only by the governmental interest in eradicating [the Department's] discriminatory practices, it also is supported by the societal interest in compliance with the judgments of federal courts." *Sheet Metal Workers'*, 106 S.Ct. at 3055 (opinion of Powell, J.). The Department's and the intervenors' claim that no compelling governmental interest exists here — a claim premised on the contention that the district court found the Department guilty "only" of hiring discrimination[17] — ignores both the character of the Department's transgressions and the fact that the district court's order simply enforced the consent decrees the Department had signed.

"In 1972, defendants were not just found guilty of discriminating against blacks in hiring to entry-level positions." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442. Rather the district court found that "the [D]epartment operated under a *regime of racism* which totally excluded blacks from all ranks in the patrol." J.A. 140 (emphasis added); *see Paradise* v. *Shoemaker*, 470 F. Supp. at 442; *NAACP* v. *Allen*, 340 F. Supp. at 705 (J.A. 26) (emphasis added) ("racial discrimination in this instance has . . . *permeated* the Department of Public Safety's employment policies").[18]

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[17] Brief for the Department at 8 n.3, 24-25, 27; Brief for the Intervenors at 8.

[18] In addition to "operat[ing] under a regime of racism," J.A. 140, the Department enforced a "regime of racism" throughout the State. *See Williams* v. *Wallace*, 240 F. Supp. 100, 105 (M.D. Ala. 1965) (blacks walking from Selma to Montgomery to protest discriminatory voting registration practices brutally attacked by 60 to 70 Alabama state troopers under the command of the Director of Public Safety). Fostering a more responsive trooper force was a principal rationale underlying the court of appeals' affirmance of the district court's 1972 injunctive decree.

> "Finally, but perhaps the most crucial consideration in our view is that this is not a private employer and not simply an exercise in providing minorities with equal opportunity employment. This is a

Given the enormity of the Department's constitutional wrong,

> it is no answer in this case to say that plaintiffs have not proven that the Department has discriminated against blacks above the entry-level seeking promotions; there were no blacks holding such positions until 1979, and even then the only black troopers promoted obtained their promotions pursuant to the 1979 Decree, not the voluntary action of the Department. On the other hand, it cannot be gainsaid that white troopers promoted since 1972 were the specific beneficiaries of an official policy which systematically excluded all blacks.

Pet. App. 42a n.16.

The district court's 1972 order was designed not only to remedy the Department's "blatant and continuous pattern of discrimination in hiring," *NAACP* v. *Allen*, 340 F. Supp. at 705; J.A. 25, but also to provide the Department with "an impetus to promote blacks." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442.[19] Having promoted none in the seven years

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police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement."

NAACP v. *Allen*, 493 F.2d 621 (citation omitted); *cf.* United States Commission on Civil Rights, Who is Guarding the Guardians?: A Report on Police Practices 153 (1981) [hereinafter, "Police Practices"] (underutilization of minorities hampers "the ability of police departments to function effectively in and earn the respect of predominantly minority neighborhoods, thereby increasing the probability of tension and violence"); President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 167 (1967) [hereinafter, "The Police"] ("to gain the general confidence and acceptance of a community, personnel within a police department should be representative of the community as a whole").

[19] As Judge Johnson explained in ruling that the 25 percent goal set in 1972 applied to the trooper force as a whole, "To focus only on the entry-

following the district court's order, *see id.*, and facing wide-ranging charges of continued discrimination, including allegations that the Department had discriminated against blacks since 1972 in making promotions to corporal,[20] the Department entered into the 1979 Decree. *See* J.A. 37-45.

Recognizing the long-term "objective" of a "racially neutral" employment system, J.A. 37, the 1979 Decree called for new disciplinary review procedures, a race relations program, and the implementation of promotion procedures with "little or no adverse impact on blacks." J.A. 39-41. Under the terms of the Decree, compliance with the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607, did not excuse the Department from developing promotion procedures which would have "little or no adverse impact on blacks." J.A. 40. In other words, the Decree mandated race-conscious promotion procedures. *Id.*[21] The

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level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Paradise* v. *Shoemaker*, 470 F. Supp. at 442.

[20] *See, e.g.*, Plaintiffs' Motion for a Preliminary Injunction ¶7(e), *Paradise* v. *Hilyer*, No. 3561-N (M.D. Ala. June 15, 1978) ("Not one black trooper has been promoted past the trooper rank, whereas six of the white troopers who were hired since 1972 have been promoted to the rank of corporal.").

[21] For this reason, the Government contended in the court of appeals that the "no adverse impact" provisions of the 1979 and 1981 Decrees:

> cannot be squared with the victim-specific limits on affirmative equitable relief under Title VII, as enunciated by the Supreme Court in [*Firefighters Local Union No. 1784* v.] *Stotts* [, 467 U.S. 561 (1984)]. These provisions appear to go beyond enjoining promotions until valid selection procedures can be implemented, requiring instead that promotions be made in accord with certain racial ratios — quotas — to ensure racially proportional promotions. To the extent that they do, the "no adverse impact" provisions are unlawful under *Stotts*.

procedures for promotion to corporal were to be developed no later than "one year from the signing of th[e] Consent Decree." *Id.* Procedures for promotion to other ranks were to follow in turn. *Id.* at 41.[22]

Almost five years later, the district court found that despite the Department's consent decree commitments

> the department *still* operates an upper rank structure in which almost every trooper obtained his position through procedures that totally excluded black persons. Moreover, the department is *still* without acceptable procedures for advancement of black troopers into this structure, and it does not appear that any procedures will be in place within the near future.

J.A. 133 (emphasis in original). Confronted with the

Brief for the United States as Appellee at 19-20, *Paradise* v. *Prescott*, 767 F.2d 1514 (11th Cir. 1985) (No. 84-7564). The Government pointed out, however, that the validity of the consent decrees and their "no adverse impact" provisions was not properly before the court, *id.*, an assessment with which the court agreed. Pet. App. 49a n.18.

[22] There was nothing inconsistent with including a race-conscious promotion provision in a decree having a "racially neutral" employment system as its objective. Such a provision dismantles "the barriers, psychological or otherwise, erected by past practices" and helps to create "a climate in which objective, neutral employment criteria can successfully operate to select public employees solely on the basis of job-related merit." *NAACP* v. *Allen*, 493 F.2d. at 621; *see Sheet Metal Workers'*, 106 S.Ct. at 3037 (opinion of Brennan, J.); *cf.* Police Practices, *supra* note 18, at 153 (disproportionately white police command structures hamper minority recruitment efforts and fuel "community perception of racism"); The Police, *supra* note 18, at 172 (crucial role of high-ranking minority police officers in fostering sensitivity within police departments and dispelling community resentment); Fallon & Weiler, *Firefighters* v. *Stotts: Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. 1, 36-37 ("fuller representation of blacks in positions of responsibility provides some assurance against a reversion to reliance on stereotypes").

Department's recalcitrance, the district court entered an order enforcing the 1979 and 1981 Decrees.[23] Designed to "eliminate the discriminatory effects of past discrimination as well as bar like discrimination in the future," J.A. 134, the enforcement order served a compelling governmental purpose. *See, e.g., Wygant*, 106 S.Ct. at 1850-51 (opinion of Powell, J.); *id.* at 1853 (opinion of O'Connor, J.); *Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of Brennan,J.).

"[F]ederal courts are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto* v. *Finney*, 437 U.S. 678, 690 (1978). The absurdity of the position asserted by the Department and the intervenors is obvious. Saddled with judicial findings of "blatant and continuous" discrimination that had "permeated [its] employment policies," *NAACP* v. *Allen*, 340 F. Supp. at 705; J.A. 25-26, employing "*still not one black*" above the entry-level, *Paradise* v. *Shoemaker*, 470 F. Supp. at 442 (emphasis in original), and facing new allegations of promotion discrimination, the Department chose to settle rather than litigate, entering into a consent decree mandating promotions with "little or no adverse impact upon blacks." J.A. 40; *see* J.A. 49-53. Told that it finally must live up to its obligations, the Department now resists enforcement

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[23] The court of appeals held that the district court's enforcement order "did not modify the 1979 and 1981 Decrees or exceed the relief authorized by those decrees." Pet. App. 27a. Although that holding is not before this Court, *see* 106 S.Ct. 3331, the Department makes a number of statements or arguments premised on the assumption that the court of appeals erred. *See* Brief for the Department at 6 (district court "did not enter an order requiring use of promotional plan '. . . that does not result in adverse impact for the initial group . . .' as required by the consent decree"); *id.* at 9 n.5; *id.* at 14 (emphasis in original) (district court "utilized race as the means of *enforcement* of consent decrees having racially neutral purposes"); *id.* at 35 ("instead of adhering to parties' purpose, district court interjected race as the means to 'enforce' the consent decrees").

by claiming that there was, after all, no judicial finding of promotion discrimination.[24]

Given that the district court's order enforced the Department's consent decree commitments, the contention by the other parties that the order is supported by nothing more than the fanciful notion that the constitution requires some sort of magical "racial balance" is misguided. *See* Brief for the United States at 22; Brief for the Department at 23-24; Brief for the Intervenors at 8.[25] The one-for-one promotion mechanism "was not imposed for the [Department's] failure to achieve" racial balance, "but for its failure to take the prescribed steps that would facilitate achieving the goal." *Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.). The district court considered the gross and longstanding racial

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[24] The corollary to the claim that there is no judicial finding of promotion discrimination is the Department's and intervenors' contention that the district court was required to hold an evidentiary hearing to resolve the question. *See* Brief for the Department at 25, 31; Brief for the Intervenors at 6-7, 12-13. But, again, because the court was enforcing previously entered consent decrees, such a determination was unnecessary. The Department's claim that it was denied an opportunity to demonstrate that the racial imbalances in its upper ranks *were not caused* by its pre-1972 hiring practices, Brief for the Department at 25, 31; *see id.* at 27, 28 n.9, is frivolous, *see* Defendants' Motion to Alter or Amend Judgement and Stay of Order at 2-3, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Dec. 27, 1983) (claim that Department was denied opportunity to demonstrate that disparities *were caused* by pre-1972 hiring practices), as is its claim, Brief for the Department at 25 (emphasis in original), that there never has "been a judicial determination that the racial disparity among the ranks were related in any way to findings of discrimination in *hiring* in 1972." *See, e.g., Paradise* v. *Shoemaker*, 470 F. Supp. at 442.

[25] Equally misguided is the Government's attempt to analogize this case to *Bazemore* v. *Friday*, 106 S.Ct. 3000 (1986). *Compare id.* at 3012 ("any racial imbalance existing in any of the clubs was the result of wholly voluntary and unfettered choice of private individuals") *with* Brief for the United States at 35 (in *Bazemore*, "clear that . . . imbalance was traceable, at least in part, to the *de jure* segregated period").

imbalances in the Department — obvious effects of the Department's past discriminatory actions that the consent decrees were designed to eliminate — simply in reaching its conclusion that the consent decrees should be enforced. J.A. 130-36. Such consideration was clearly proper. *Cf. United States* v. *City of Chicago*, 663 F.2d 1354, 1360 (7th Cir. 1981) (en banc) ("essential purpose of th[e] quota (parity of minority representation, at a substantial level, between patrol officers and sergeants) has been achieved, and changed conditions have rendered continuance of the quota without modification an inequitable and unnecessary burden on presumably innocent individuals").

B. *The District Court's Enforcement Order Was Appropriately Tailored*

In determining whether race-conscious remedies are appropriately tailored, this Court has looked to factors such as the necessity for the relief, the flexibility and duration of the relief, the relationship of any numerical goals to the relevant labor market, and the impact of the relief on third-parties.[26] When viewed in light of these same factors, the order here is clearly proper.

By turning a blind eye to reality, the Government fails to acknowledge the compelling circumstances that confronted the district court and made the order necessary. By focusing on the one-for-one promotion requirement rather than the conditions under which it applies and the goal at which it is directed, the Government distorts the true fabric of the

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[26] *See Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of Brennan, J.); id. at 3054-55 (opinion of Powell, J.); *Wygant*, 106 S.Ct. at 1850-52 (opinion of Powell, J.); *id.* at 1853 (O'Connor, J., concurring in part and concurring in judgment); *id.* at 1857-58 (White, J., concurring in judgment); *id.* at 1864-65 (Marshall, J., dissenting); *id.* at 1869-71 (Stevens, J., dissenting).

remedy. The order is both temporary and inherently flexible. The one-for-one promotion requirement operates only until the Department adopts acceptable promotion procedures or until the goal of 25 percent black representation in each rank has been achieved. Because the order is conditional, the Department may preclude further use of the one-for-one promotion requirement by implementing acceptable promotion procedures. J.A. 136. This is not an abstract possibility. The one-for-one requirement has been used for only one set of promotions, and the district court has provisionally suspended its further use. Even if it were to apply systematically, the one-for-one promotion mechanism would not unfairly or unnecessarily infringe on the legitimate interests of white troopers.

1. *The District Court Had Broad Remedial Authority to Combat Discrimination*

In issuing its order, the district court exercised its equitable powers. Having found that the effects of the Department's pervasive discriminatory practices were continuing despite its consent decree commitments, the "scope of [the] district court's equitable powers to remedy past wrongs [was] broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971).[27]

The "choice of remedies to redress racial discrimination is a 'balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Fullilove* v. *Klutznick*, 448 U.S. 448, 508 (1980) (citation omitted) (Powell, J., concurring). "[H]aving had the parties before it over a period of time, [the district court] was in the

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[27] *See International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 364 (1977).

best position to judge whether an alternative remedy . . . would have been effective in ending [the Department's] discriminatory practices." *Sheet Metal Workers*, 106 S.Ct. at 3056 (opinion of Powell, J.); *cf. Brown* v. *Board of Education*, 349 U.S. 294, 299 (1955) ("[b]ecause of their proximity to local conditions," district courts are in the best position to appraise compliance with constitutional guarantees). Only if this Court concludes that the district court abused its discretion in fashioning a remedy would it be appropriate to reverse the judgment of the court of appeals.[28] No such conclusion is warranted here.

2. *The Order Was Clearly Necessary*

"It is doubtful, given [the Department's] history in this litigation, that the District Court had available to it any other effective remedy." *Sheet Metal Workers'*, 106 S.Ct. at 3056. In 1972, the district court found that the Department had ignored the injunctive order in *Frazer* barring continued discrimination. 340 F. Supp. at 708. In 1975, the district court found that the Department had, "for the purpose of frustrating or delaying full relief to the plaintiff class, artifically

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[28] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 424 (1975) (citation omitted) ("the standard of review will be the familiar one of whether the District Court ... abused its traditional discretion to locate a just result in light of the circumstances peculiar to the case"); *see Milliken v. Bradley*, 433 U.S. 267, 288 (1977); *Williams* v. *City of New Orleans*, 729 F.2d 1554, 1560 (5th Cir. 1984) (en banc); *Crockett* v. *Green*, 534 F.2d 715, 718 (7th Cir. 1976). Application of a multi-factor test to ascertain the appropriateness of race-conscious remedies, *see, e.g., Sheet Metal Workers'*, 106 S.Ct. at 3052-53 (opinion of Brennan, J.); *id.* at 3055-57 (opinion of Powell, J.), is a task calling for considered judgment. Not only do the tests contain several factors to be balanced, but the factors themselves — which inquire into the necessity, flexibility, duration, scope, and burden of the remedy — are not susceptible to mechanical application.

restricted the size of the trooper force." J.A. 34. In 1983, the district court found that the Department, despite its consent decree commitments, was "still without acceptable procedures for advancement of black troopers . . . and it d[id] not appear that any procedures would be in place within the near future." J.A. 133 (emphasis in original). Based on its experience with alternative remedies,[29] and having solicited proposals from the parties, J.A. 123, the district court had no choice but to conclude that "it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action" the effects of the Department's egregious discrimination would "not dissipate within the near future." J.A. 135; *see* J.A. 136.

Instead of acknowledging the situation that faced the district court, the Government creatively reconstructs the facts. As if to suggest that black troopers had been progressing to positions of responsibility in an orderly manner, the Government claims that by 1983, "the results [achieved under the district court's 1972 one-for-one hiring order] had begun to *manifest* themselves in the upper ranks." Brief for the United States at 36 (emphasis added). Taking its rewrite of the record one step further, the Government claims that, because the Department "had already made *substantial progress* in achieving 'racial balance,' the one-for-one promotion quota was unnecessary no matter how the quota's purpose is characterized." *Id.* at 37 (emphasis added).

The very "evidence" the Government cites proves the opposite. The four black corporals to which the Government points were promoted, not on the Department's own initiative, but only as the result of an interim agreement entered simultaneously with the 1979 Decree. Pet. App. 42a; J.A. 41,

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[29] As the district court explained, "In an earlier order this court demonstrated dramatically the efficacy of quotas, over other remedies, in instances where blacks have historically been completely excluded or almost completely excluded from employment. *NAACP* v. *Dothard*, 373 F.Supp. 504 (M.D. Ala. 1974) (Johnson, C.J.)." J.A. 134.

46-48. The Department's 1983 proposal to promote four blacks and eleven white troopers to corporal came only after the district court had prohibited the Department from using a promotion procedure that would have guaranteed that every promotion would go to a white trooper. J.A. 117-24. And the Department's promotion procedures which "brought three additional blacks to the rank of corporal and two to the rank of sergeant," Brief for the United States at 37, were adopted only after the district court had entered its one-for-one promotion order, making it clear that it would not countenance further delay.

The Government's argument that the district court "clearly erred" in rejecting the Department's proposal to promote four blacks and eleven whites, Brief for the United States at 28, is nothing more than a thinly disguised attempt to reassert the claim — resoundingly rejected by the court of appeals — that the district court modified, rather than enforced, the consent decrees.[30] Furthermore, the Government's position ignores

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[30] *Compare* Brief for the United States at 28 (citations omitted)(emphasis added):

> the Department's proposal, as compared with the the extreme quota upon which Paradise insisted, plainly represented the "less intrusive means" ... by which to make the needed promotions *within the spirit of the consent decrees* ... As the Department explained below, its proposal met "the requirements of the four-fifths rule of the *Uniform Guidelines* concerning adverse impact," *the standard that the consent decrees embodied* ...

with Pet. App. at 10 n.4 (citation omitted):

> Although it was contemplated by the earlier consent decrees that specific numbers of blacks would be promoted, the one-for-one quota was greatly different, in kind and degree. Accordingly, the one-for-one quota is clearly a modification of the prior decrees because it requires more of the Department than simply avoiding ... adverse impact. Thus, the issue here, as in *Stotts*, is whether a "disputed modification of a consent decree" ... may require racial quotas.

not only the district court's legitimate interest in making up for the Department's delay,[31] but also the district court's interest in avoiding "endless enforcement litigation." *Sheet Metal Workers'*, 106 S.Ct. at 3036 (opinion of Brennan, J.). The 1979 Decree required the Department to develop promotion procedures without adverse impact not only for corporals, but also for sergeants, lieutenants, captains, and majors. J.A. 41. In entering its order, the district court made it clear that "any relief fashioned by the court must address the department's delay in developing acceptable promotion procedures *for all ranks*." J.A. 133 (emphasis added).[32] Had it accepted the Department's proposal to promote eleven whites and four

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[31] The Government's contention that "in the four years after the signing of the 1979 Decree, the Department . . . had acted with reasonable diligence," Brief for the United States at 24 n.13, is of very recent origin. Before the district court, the Government pointed out that the defendants had failed for ten months to respond to the Government's request for a proposal for making promotions in conformity with the 1979 Decree and had "failed to offer any reason why promotions should not be made, nor had they offered an explanation as to why they halted progress toward remedying the effects of past discrimination." Pet. App 16a n.10. According to the Government, the Department's conduct "'suggest[ed] that a pattern of discrimination against blacks... may be continuing.'" *Id.* (citation omitted). Furthermore, the Government's attempt to portray the burden on the Department as being particularly onerous, *see* Brief for the United States at 24 n.13, is belied by the Department's recent progress in implementing promotion procedures. After having failed for almost five years to develop a promotion procedure that conformed to its consent decree commitments, the Department developed what it claimed was an acceptable procedure within seven months of the court's order. J.A. 142.

[32] Contrary to the Department's representation to this Court, *see* Brief for the Department at 36, the Department's promotions of white troopers between 1979 and 1983 had not been limited to those made pursuant to the 1979 Decree. *See* Transcript of Proceedings at 21-22, *Paradise* v. *Shoemaker*, No. 3561-N (M.D. Ala. May 27, 1983).

blacks and contented itself with the Department's pledge to develop acceptable corporal selection procedures "as soon as possible," J.A. 126, the district court would have done nothing to prevent continued recalcitrance.

A "district court may adapt the form of the application of its power according to the resistance with which it is confronted." *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, Local 418*, 334 F.2d 1014, 1020 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965). Here, entering an order requiring promotions without adverse impact merely would have reiterated an obligation the Department had already assumed. *See* J.A. 40-41 (1979 Decree); *id.* 50 (1981 Decree). "[T]aking the long and unhappy history of the litigation into account, the court was justified in entering a comprehensive order to insure against the risk of inadequate compliance." *Hutto* v. *Finney*, 437 U.S. at 687.[33]

The Government's "plentiful alternatives" — alternatives it never presented to the district court — are ill-suited to the task the district court was facing . Imposing "stringent contempt sanctions . . . to remain in effect until the Department produced an acceptable long-term promotion plan," Brief for the United States at 25, would not have allowed the Department to meet its immediate "need of at least 15 new corporals." J.A. 130. And, appointing a trustee or administrator "to supervise the Department's progress, or even to make the promotions himself by the proper standard," Brief for the United States at 25, in addition to inevitably fostering delay, would have been far more disruptive of the Department's operations than a

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[33] *Cf. Sheet Metal Workers'*, 106 S.Ct. at 3051 (opinion of Brennan, J.) ("In light of petitioners' long history of 'foot dragging resistance' to court orders, simply enjoining them from once again engaging in discriminatory practices would clearly have been futile. Rather, the District Court properly determined that affirmative race-conscious measures were necessary to put an end to petitioners' discriminatory ways.").

directive that allowed the Department to conduct its own affairs subject to the court's review.[34]

In any event, the district court surely was not required to employ remedy after remedy before it reasonably could conclude that race-conscious relief was warranted. *See Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.); *Fullilove* v. *Klutznick*, 448 U.S. at 508 (Powell, J., concurring); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n.26 (1974) ("once the goal of increasing the percentage of Blacks in the professions is accepted as either legitimate or compelling ..., the fit between a racial classification and that goal should present no problem"). Such a course was particularly unnecessary here given that the consent decrees themselves called for race-conscious action. In light of the Department's history of obstructionism, "it is fair to conclude that absent authority to" enter its conditional promotion order, "the District Court may have been powerless to provide an effective remedy." *Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.).

3. *The One-for-One Promotion Requirement Is Inherently Flexible, Temporary in Effect, and Geared to the Relevant Labor Market*

The one-for-one promotion requirement is not a rigid remedy. It accommodates "*legitimate* reasons for the

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[34] In addition to potentially requiring an evidentiary hearing for every black trooper on the force, the Government's suggested remedy of competitive seniority confuses a court's power to award individual make-whole relief with its power to order race-conscious measures.

> The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members;

[Department's] failure to" make progress toward eliminating the effects of its unlawful discrimination because it does not mandate unnecessary promotions or require the Department to promote unqualified black troopers. *Sheet Metal Workers'*, 106 S.Ct. at 3052 n.49 (opinion of Brennan, J.) (emphasis in original); *see Fullilove* v. *Klutznick*, 448 U.S. at 488 (requirement of 10 percent set aside for minority business enterprises subject to administrative waiver if minority contractors unavailable); J.A. 128. Furthermore, the one-for-one requirement applies only if the Department fails to develop acceptable promotion procedures for a particular rank pursuant to its consent decree commitments and, then, only if 25 percent of troopers at the rank are not black. *Id.*

The district court has applied the one-for-one requirement sparingly. Used for only one set of promotions to corporal, succeeding promotions to corporal and sergeant were made on the basis of new selection procedures for those ranks, and the one-for-one requirement was suspended. J.A. 163-64, 176-77. In fact, "the defendants have been allowed to promote only white troopers to the lieutenant and captain ranks since there apparently are no black troopers qualified for promotion to those ranks." Pet. App. 34a. Regardless of whether the Department easily could prove that a promotion procedure for a particular rank would have no long-term adverse impact prior to its implementation, it is clear that "[a]s an enforcement device . . . the one-for-one quota was designed to operate against the Department for a long time to come," Brief for the United States at 24, only in the sense that it was designed to

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no individual is entitled to relief and beneficiaries need not show that they were themselves victims of discrimination.

Sheet Metal Workers', 106 S.Ct. at 3049 (opinion of Brennan, J.).

end permanently the Department's recalcitrance.[35] At most, it lasts as long as the Decrees it was designed to enforce.

The Government's contention that "the one-for-one quota greatly exceeds the percentage of blacks in the relevant labor pool — *viz.*, entry-level troopers eligible for promotion — and thus could not be justified as a flexible 'benchmark'", Brief for the United States at 33, distorts the true character of the order and ignores the district court's need to fashion effective relief. Even if the Department fails to adopt promotion procedures for a rank in compliance with its consent decree commitments, the order imposes the one-for-one mechanism only until blacks are 25 percent of the officers at the rank — a figure that "is directly related to the percentage of [blacks] in the relevant workforce." *Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.).[36] Without authority to employ a flexible mechanism requiring promotions at a rate greater than 25 percent under certain circumstances, the district court would have been without a remedy that ended the Department's resistance and insured future compliance.

Courts often have approved hiring or promotion mechanisms requiring selection of minorities in a proportion

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[35] At the same time that it criticizes the lower court for adopting a remedy that might last "a long time," the Government seems to say that it would have preferred a numerical remedy that would have lasted even longer — one that mirrored the proportion of black troopers at a lower rank. Brief for the United States at 28-29.

[36] The extant court orders require the Department to achieve black representation of 25 percent within the Department as a whole, J.A. 27, and either black representation of 25 percent at each rank above entry-level or adoption of acceptable promotion practices at each rank. J.A. 128. The 25 percent hiring benchmark mirrors the percent of Alabama's population that is black. J.A. 134 n.2. The promotion benchmark of 25 percent at each rank is identical to the hiring goal.

substantially greater than the ultimate goal that is sought to be achieved.[37] In *Sheet Metal Workers'*, this Court approved the lower court's adoption of a 29.23 percent minority incumbency goal, the same as the percentage of minorities in the relevant labor market. 106 S.Ct. at 3031. In doing so, the Court was keenly aware that hiring of minorities necessarily would occur at a rate higher than 29.23 percent if the incumbency goal were to be achieved in the foreseeable future.

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[37] *See, e.g, Kirkland* v. *New York State Dep't of Correctional Serv.*, 711 F.2d 1117 (2d Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (Title VII case; as interim measure until validated selection procedures implemented, all promotions to be offered to qualified minorities until minority appointments equal 21 percent of rank); *Firefighters Inst. for Racial Equality* v. *City of St. Louis*, 588 F.2d 235 (8th Cir. 1978), *cert. denied*, 443 U.S. 904 (1979) (Title VII case; as interim relief pending development of non-discriminatory exam, twelve black firefighters ordered immediately promoted to fire captain, twelve whites to be promoted at discretion of district court); *United States* v. *City of Chicago*, 573 F.2d 416 (7th Cir. 1978) (Title VII case; until validated tests developed and used, all minorities on current eligibility lists to be offered permanent promotions before whites on lists may be promoted); *Crockett* v. *Green*, 534 F.2d 715 (7th Cir. 1976) (Equal Protection case; one-for-one appointments to skilled craft positions until percentage of blacks in job classification matches that of blacks in city population (17.2 percent)); *Bridgeport Guardians, Inc.* v. *Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973), *aff'd* , 497 F.2d 1113 (2d Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) (Equal Protection case; one for one hiring quota until 15 percent minority patrolmen); *United States* v. *N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) (Title VII case; one-for-one promotion ratio until at least 15 of 100 foremen are black); *Vulcan Society of New York City Fire Dep't, Inc.* v. *Civil Serv. Comm'n of New York*, 490 F.2d 387 (2d Cir. 1973) (Equal Protection case; one for three hiring ratio upheld as interim relief until validated selection procedure implemented); *Castro* v. *Beecher*, 459 F.2d 725 (1st Cir. 1972) (Equal Protection case; one for one, two, or three hiring ratio, at discretion of district judge, until current pool of eligibles exhausted; new, validated examination to be expeditiously developed); *Carter* v. *Gallagher*, 452 F.2d 315 (8th Cir. 1971) (en banc), *cert. denied*, 406 U.S. 950 (1972) (Equal Protection case; one for two hiring until 20 minority fire-fighters hired).

See, e.g., id. at 3062 (opinion of O'Connor, J.).[38] Similarly, in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the Court approved a voluntary agreement between a company and a union providing that 50 percent of new trainees were to be black until the percentage of black skilled craftworkers in the plant approximated the percentage of blacks in the local labor force — 39 percent. *Id.* at 198. The Court found that the plan was carefully drawn to break down "old patterns of racial segregation and hierarchy." *Id.* at 208. Given the conditional nature of the one-for-one requirement here and its suspension after only one use, it is clear that it is far less rigorous in nature or operation than comparable mechanisms approved in many other cases.

Whether this Court believes that, for example, a two-for-three or a three-for-four requirement would have served the purpose of the district court's one-for-one order equally well is not the question. Every numerical remedy "necessarily involve[s] a degree of approximation and imprecision."

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[38] In *Sheet Metal Workers'*, approximately 45 percent of newly indentured members were non-white. 106 S.Ct. at 3031 n.18. Previously, the district court had established a one-minority-for-one-white hiring mechanism to remain in effect until the 29.23 percent membership goal had been achieved. *Id.* at 3031. Although the court of appeals set aside the one-for-one hiring requirement, it recognized that "temporary hiring ratios may be necessary in order to achieve integration of a work force from which minorities have been unlawfully barred." *EEOC* v. *Local 638 ... Local 28 of the Sheet Metal Workers' Int'l Ass'n*, 753 F.2d 1172, 1188 (2d Cir. 1985), *aff'd*, 106 S.Ct. 3019 (1986). The court of appeals set aside the one-for-one mechanism because "petitioners had voluntarily indentured 45% nonwhites since January of 1981" so that "the Court concluded that a strict one-to-one hiring requirement was not needed to insure that a sufficient number of nonwhites were selected for the apprenticeship program." 106 S.Ct. at 3031 n.18. Here, by contrast, the district court and the court of appeals concluded that the one-for-one promotion mechanism was necessary.

Teamsters v. *United States*, 431 U.S. at 372. "This Court . . . appropriately deal[s] with the large constitutional principles; other federal courts ha[ve] to grapple with the flinty, intractable realities of day-to-day implementation of those constitutional commands." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 6; *see Sheet Metal Workers'*, 106 S.Ct. at 3056 (opinion of Powell, J.).

4. *The Order Has a Limited Impact On White Troopers*

"As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 106 S.Ct. at 1850 (opinion of Powell, J.). "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible." *Fullilove* v. *Klutznick*, 448 U.S. at 484 (opinion of Burger, C.J.), *quoting Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 777 (1976).

The burden in this case is extremely light and upsets no legitimate expectations of white troopers for promotion. To accept the Government's contention that the district court's order is too intrusive merely because it "casts its onus not on the general public, but on a finite . . . number of identifiable individuals," Brief for the United States at 39, would be tantamount to adopting the "simplistic" conclusion that race-conscious promotion remedies can never "withstand constitutional muster." *Sheet Metal Workers'*, 106 S.Ct. at 3057 n.3 (opinion of Powell, J.).

Notwithstanding the attempt by the Department to lure this Court into believing otherwise, *see* Brief for the Department at 14, 29, 32, the district court's order does not compel the Department to promote unqualified black troopers at the expense of more qualified white troopers. The district court's one-for-one promotion requirement applies only if the Department fails to adopt acceptable promotion procedures

and, even then, only "if there is a black trooper objectively qualified to be promoted." J.A. 128. Expectations of promotion, such as those harbored by intervenors here, based on invalid, discriminatory selection procedures[39] are entitled to little weight. As the court of appeals explained in an earlier phase of this case:

> [N]o applicant for public employment can base any claim of right under the Fourteenth Amendment's equal protection or due process clauses upon an eligibility ranking which results from unvalidated selection procedures that have been shown to disqualify blacks at a disproportionate rate. This is so because by definition such

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[39] The Department never actually claimed that its procedure for selecting troopers for promotion to corporal that was found wanting by the district court was valid. Rather, the Department claimed only that its written test — one of four components of the corporal selection process — was valid. *See, e.g.*, Motion for Reconsideration at 2-3, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Nov. 10, 1983); *see also* Motion of Department of Public Safety for Reconsideration and to Alter, Modify or Amend January 13, 1984 Order at 7, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Jan. 23, 1984) (after analyzing other "factors in the promotional procedure, it is now apparent other alternatives and combinations must be explored"). And, even if it had claimed, and demonstrated, that the entire selection process were valid, the point would have been of little consequence for reasons quite apart from the "no adverse impact" provisions of the consent decrees. Before using a job-related test that has adverse impact, an employer must determine that there are no reasonable, alternative procedures available. *See* 29 C.F.R. § 1607.3.B. The wisdom of this requirement is graphically illustrated in this case. As soon as the Department was told that the court would tolerate no more delay, it developed a corporal selection procedure that it claimed was valid but had no apparent adverse impact. J.A. 142; Pet. App. 45a. Similarly, the Department developed a procedure for the selection of sergeants that it claimed was valid and, again, had no apparent adverse impact. *See* Statement of Completion of Procedure for Promotion to Rank of Sergeant, *Paradise* v. *Prescott*, No. 3561-N (M.D. Ala. Aug. 16, 1984); J.A. 176-177; Pet. App. 7.

> criteria have not been shown to be predictive of successful job performance. Hence, there is no reliable way to know that any accepted applicant is truly better qualified than others who have been rejected. Until the selection procedures used by the defendants here have been properly validated, it is illogical to argue that quota hiring produces unconstitutional "reverse" discrimination, or a lowering of employment standards, or the appointment of less or unqualified persons.

NAACP v. *Allen*, 493 F.2d at 618.[40]

Like the hiring goal in *Sheet Metal Workers'*, the conditional promotion requirement in this case results in a "[d]enial of a future employment opportunity," not the "loss of an existing job." *Wygant*, 106 S.Ct. at 1851 (opinion of Powell, J.). Even if suspension of the one-for-one requirement were lifted and the requirement were employed systematically until the 25 percent goal had been achieved, no white trooper would lose a job or be demoted, and substantial promotion opportunities for white troopers would continue to be available.[41]

Unlike the preferential layoff scheme in *Wygant*, the conditional promotion requirement here has, at most, a trivial

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[40] In addition, the Department planned to use the "rule of three" as provided in the Alabama Merit System Law in making promotions. *See supra* note 13. Thus, even if the Department's selection procedure had been valid, the first person on the promotion list would have had no "right" to a promotion. Since the district court's order was entered, the "rule of three" has been replaced by the "rule of ten." *See id.*

[41] The intervenors misconstrue the district court's order when they imply that it bars white troopers from advancing. *See* Brief for the Intervenors at 11, 17. On the one occasion the one-for-one promotion mechanism was used, eight white troopers were promoted. Pet. App. 22a. The only effect on white troopers was a temporary reduction in the number of promotion opportunities available.

impact on any expectations of promotion white troopers may have on the basis of their seniority. Whatever part seniority normally may play "in allocating benefits and burdens among employees," *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 239 (1982); *see Franks* v. *Bowman Transportation Co.*, 424 U.S. at 766-67, it has an insignificant role in this case.[42] Given that white troopers have "no legitimate expectation of promotion" on the basis of their seniority, this case is "closer to the hiring case, since, although there may occasionally be some inequity, nonminority employees are not deprived of a benefit that they had reason to expect." Edwards & Zaretsky, *Preferential Remedies for Employment Discrimination*, 74 Mich. L. Rev. 1, 40 (1975) ("easier to order preferential remedy" where promotions not made on basis of seniority); *see* Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 Sup. Ct. Rev. at 67 ("promotion resembles hiring in the sense that dispreferred white does not lose an existing job;" however, where seniority plays "a significant role in promotion decisions, overriding that criterion can produce the same sense of grievance ... as ... in the layoff setting").[43]

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[42] Differences in seniority could account for no more than a three percent difference in final ratings of candidates for promotion to corporal. *See supra* note 10. *But cf.* Brief for the Intervenors at 17 ("only natural for [white troopers] to expect that many years of service will result in the ultimate reward: promotion"); Brief for the United States at 39-40 (emphasizing role of seniority in promotion decisions and in creating expectations of promotions).

[43] Because seniority plays a trivial role here, the Court need not determine the circumstances under which "employee expectations arising from a seniority system" must give way to the "strong public policy interest" in eliminating the effects of pervasive discrimination. *Franks* v. *Bowman Transp. Co.*, 424 U.S. at 778. Nor need the Court weigh the degree to which seniority-based expectations must be tempered by the fact that white employees with long tenure are those whose hopes of

In sum, the order below does not "unnecessarily trammel the interests of white employees," *Weber*, 443 U.S. at 208 (opinion of Brennan, J.), or cause a "serious disruption" in their lives. *Wygant*, 106 S.Ct. at 1851-52 (opinion of Powell, J.). The burden on white troopers is small, and their legitimate expectations of promotion are not substantial. Failing to achieve a promotion in this case is far more comparable to not being hired than it is to losing an existing job.

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promotion are most likely the "product [ ] of discrimination and hence tainted." *University of California Regents* v. *Bakke*, 438 U.S. 265, 365 (1978) (opinion of Brennan, J.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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